GIPC Comments on
The Rights of Making Available and Communication to the Public
to the U.S. Copyright Office
April 4, 2014

The U.S. Chamber of Commerce appreciates the opportunity to provide our comments on these important issues. We also appreciate the leadership of the U.S. Copyright Office in its thoughtful consideration of copyright policy issues and we support its efforts and desires for modernization so as to better serve businesses that produce valuable copyrighted works, businesses that help deliver those works to the public, and consumers who benefit from both.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations.

The Global Intellectual Property Center (GIPC) was established in 2007 as an affiliate of the U.S. Chamber of Commerce. Today, the GIPC is leading a worldwide effort to champion intellectual property rights and safeguard U.S. leadership in cutting-edge technologies as vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges.

I. Existing Exclusive Rights Under Title 17

The Internet Treaties[1] concluded in 1996 articulate obligations for, among other things, a right of making available and a right of communication to the public. The United States implemented the provisions of those treaties through the Digital Millennium Copyright Act of 1998.[2] No changes were made to the scope of exclusive rights and for several years it was uncontroversial that none were need in order for

[1] The term "Internet Treaties" is widely understood and used here to refer to both the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT").
[2] 79 F.R. 10571 (Feb. 25, 2014).

the United States to comply with the making available and communication to the public rights. More recently, some courts and commentators consider the contrary, particularly with regard to the distribution right. They conclude that making available a copyrighted work does not implicate the distribution right, only a literal distribution does. The GIPC disagrees.

The GIPC considers that two important elements of good copyright law and policy are: (1) clarity so as to maximize certainty in the business environment; and (2) commercially reasonable rules that provide effective tools against theft. The current scope of exclusive rights under Title 17 with regard to the making available right, in fact, largely provides both. The debate around these issues has made the business environment less certain, but the solution to a misinterpretation need not be new legislation.

a. How does the existing bundle of exclusive rights currently in Title 17 cover the making available and communication to the public rights in the context of digital on-demand transmissions such as peer-to-peer networks, streaming services, and downloads of copyrighted content, as well as more broadly in the digital environment?

As stated in the Federal Register notice, it has been the view of the United States Government since the articulation of the making available and communication to the public rights in the 1996 Internet Treaties, that U.S. copyright law already provides for exclusive rights covering the same scope of activity as mandated by those rights.[3] That is, the scope of activity that falls within the exclusive rights of reproduction, distribution, public performance and public display collectively encompasses all of the activity mandated by the Internet Treaties. The Federal Register notice correctly stated that this view has been articulated by the Copyright Office and others, and followed by Congress in its implementation of the Internet Treaties.[4] This is uncontrovertibly true.

[3] *Id*.
[4] *Id*.

The GIPC also observes that successive presidential administrations of both parties have taken this view and incorporated obligations for rights of making available and communication to the public in free trade agreements ("FTAs") with no less than 17 countries.[5] Each and every of those FTAs was approved by Congress, at a variety of times over the past decade and a half, and regardless of shifting control of either the Senate or House of Representatives. The rule that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains" is among the oldest and best-established precedents in American law.[6] Here, not only does a possible construction remain, it is the expressed intent of several Congresses and Administrations.[7]

b. Do judicial opinions interpreting Section 106 and the making available right in the framework of tangible [copies of] *works provide sufficient guidance for the digital realm?*

The distinct characteristics of digital copies are well known to include ease of reproduction, flawless reproduction, near-instantaneous distribution, and near-zero marginal costs for all the above activities. These characteristics make digital copies more desirable for both business and consumers. Unfortunately, the same is true for pirates. Thus, the practical realities of digital technology have altered the policy landscape in copyright.

The exclusive rights set forth in Section 106 are technology neutral, and the exclusive rights they provide apply fully in the digital realm. So, at the conceptual level decisions about the scope of rights with regard to copies in analog form are fully applicable to copies in digital form.

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[5] Austalia, Bahrain, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, South Korea, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. The text of each agreement is freely and publicly available at: http://www.ustr.gov/trade-agreements/free-trade-agreements.

[6] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118, 2 Cranch 64, 118 (1804).

[7] 79 F.R. 10571, n. 5, *citing* H.R. Rep. No. 105-551 at 9 (1998).

From a practical policy perspective, it is even more important in the digital, online environment that the distribution right fully covers "making available" activities. In the analog context, violations of the distribution right were relatively easy to prove and caused less commercial harm. Such violations were easier to prove because a physical copy would have changed hands. And they caused less commercial harm because analog copies of analog copies were of lower quality, required significant time and/or money to produce and distribute, and copying of a significant quantity required commercial scale equipment.

In the digital context, none of that is true anymore. Literal distribution can occur completely unbeknownst to the right holder, and with little or no evidence after the fact. Additional, perfect copies can be made en masse, and they too can be distributed without evidence. The making available online of unauthorized digital copies of copyrighted works can, and infamously is, undermining the legitimate market for these works.

Courts have approved distribution to the plaintiff's own investigator to establish a violation of Section 106(3).[8] However, this imposes an unnecessary and formalistic step that would not be required under a proper interpretation of the distribution right.

II. Foreign Interpretation and Implementation of the WIPO Internet Treaties

If there is any question as to the meaning of the obligations found in the Internet Treaties, and we do not believe there is, it can be answered by the highly-respected treatise, "Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms."[9] That treatise specifically discusses the negotiators' intent regarding the making available right and its relation to the distribution right in national laws:

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[8] *See*, *e.g.*, *Olan Mills*, *Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994).

[9] Mihaly Ficsor, World Intellectual Property Organization (2003).

> ...when this provision was discussed in Main Committee I, it was stated – and no delegation opposed the statement – that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right (with appropriate exceptions). By the "other" right, of course, first of all, the right of distribution was meant, but a general right of making available to the public might also be such an "other right.[10]

Consistent with this framework, many countries have since opted to provide an explicit right of "making available to the public" in their copyright statute, either as a standalone right or as an aspect of the right of communication to the public. Some, including the United States, found that their existing articulation of rights already fully implemented the right of making available. But in either case, the obligation to cover the act of making available copyrighted works remains unchanged.

Notwithstanding international obligations, we know well that many countries have deficiencies in their implementation, and especially in enforcement, of copyright. For the second year running, the GIPC has commissioned an assessment of the implementation of legal standards, enforcement of rights, and participation in international instruments to provide a roadmap for countries interested in improving their intellectual property systems and promoting a knowledge-based economy.[11] Several of the criteria used in this report relate to the implementation of the making available and communication to the public rights, enforcement of those rights, and ratification of the Internet Treaties.

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[10] *Id*. at CT-8.10.

[11] "Charting the Course, GIPC International IP Index," 2d Ed., (2014)(available at http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/Index_Map_Index_2ndEdition.pdf).

The United States is a leader in intellectual property protections and IP-intensive industries. According to the U.S. Department of Commerce, over 40 million jobs in the United States are supported by IP-intensive industries.[12] This county should provide the best example to other countries seeking to follow our path to success.

III. Possible Changes to U.S. Law

The rights of distribution, reproduction, public display and public performance, properly understood, already encompass the act of making available copyrighted works. A legislative change for the purpose of restating that fact is unnecessary at this stage. Indeed, were such an amendment to be contemplated, it would be necessary to include language clarifying that the adoption of such does not imply that the Copyright Act had not previously provided such a right. Far more preferable than this lawyer's exercise to have the law say what it already says is the use of this process for the Copyright Office authoritatively to re-state the Office's position, this time in a more formal agency report, its views as the agency responsible for administering the Copyright Act.

There is an aspect of making available and communication to the public on which U.S. law could be improved. The WCT mandates a right of communication to the public, including making available.[13] The WPPT provides different treatment, breaking the interactive making available right apart from the noninteractive right of communication to the public.[14] In its instrument of ratification of the WPPT, the United States took a reservation, as permitted by WPPT Art. 15.3:

> Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances

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[12] "Intellectual Property and the U.S. Economy: Industries in Focus," Economics and Statistics Administration and United States Patent and Trademark Office (2012)(available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf).

[13] WCT Art. 8.

[14] Compare WPPT Art. 10 and WPPT Art. 14. with WPPT Art. 15.

> and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.[15]

This reservation reflects the limited public performance right provided to sound recordings in the U.S. Copyright Act. As the Copyright Office is well aware, legislative proposals to provide a full public performance right for sound recordings have been under consideration for years. We suggest that this proceeding is another opportunity to remind Congress that while U.S. law is compliant with the WPPT, we are not setting the best example we can for the rest of the world. The United States should provide a full public performance right for sound recordings and rescind the reservation to the WPPT accordingly.

Conclusion

The GIPC appreciates this opportunity to provide comments to the U.S. Copyright Office. The need for clarity in our full implementation of the making available right is real. We appreciate the Copyright Office undertaking this consideration and hope that the matter can be resolved with an administrative finding of what had seemed clear to most from the start. We look forward to continuing to work with the Copyright Office on this and other important issues.

[15] WPPT Notification No. 8, Ratification by the United States of America (Sept. 14, 1999)(available at http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html).